IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-706

CLARENCE H. BENNETT, *et al.*,

Petitioners,

v.

GILBERT KIGGINS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

ELLSWORTH T. SIMPSON
Bowen Building – Suite 500
815 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 393-2244

Attorney for Petitioners.

Washington, D.C. • THIEL PRESS • (202) 638-4521

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No.

CLARENCE H. BENNETT, *et al.*,

Petitioners,

v.

GILBERT KIGGINS, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Clarence H. Bennett, Dorothy G. Bennett and National Standards Association, Inc., petitioners herein, respectfully petition this Court for a writ of certiorari to review the judgments of the District of Columbia Court of Appeals in their respective cases, which were consolidated by the Court below for all purposes, and decided in a single opinion.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App. A, *infra.*) is reported at *Bennett v. Kiggins,* 277 A.2d 57 (D.C. App. 1977). The opinion of the Superior Court for the District of Columbia (App. B, *infra.*) is unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals in each case was entered on August 18, 1977. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the District of Columbia Court of Appeals denied petitioners their rights to due process of law by "deeming" certain documents to be included in the record on appeal although such documents were never filed in the trial court.

2. Whether the District of Columbia Court of Appeals contravened Plaintiffs' Constitutional right to a jury trial by upholding Respondents' Motion for Summary Judgment notwithstanding the existence of disputed material facts.

LAWS AND COURT RULE INVOLVED

CONSTITUTION OF THE U.S.

(Amendment VII)

(Trial by Jury in Civil Cases)

In suits by common law, where the value in controversy shall exceed twenty dollars, the right of trial by a jury, shall be otherwise re-examined in any

Court of the United States, then according to the rules of the common law.

(Amendment XIV)

Section 1.

(Citizenship Rights Not to Be Abridged by States)

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

DISTRICT OF COLUMBIA COURT OF APPEALS RULE 10(1)

(a) CORRECTION OR MODIFICATION OF THE RECORD. If any difference arises as to whether the record truly discloses what occurred in the trial court, the difference shall be submitted and settled by that court and the record made to conform to the truth. If anything material to either party is misstated therein, the parties by stipulation, or the trial court upon motion or notice to the parties, either before or after the record is transmitted to this court, or this court, on proper suggestion or of its own initiative, may direct that the omission be supplied or misstatement corrected; and, if necessary, that a supplemental record be certified and transmitted by the clerk of the trial court. All other questions as to the form and content of the record

shall be presented to this court. No change of substance shall be made by the trial court in the transcript prepared by the court reporter for use on appeal either before or after said transcript has been filed except following notice to counsel for both sides of the proposed changes and an opportunity allowed for counsel to be heard.

STATEMENT OF THE CASE

In early 1969, Robert Menzel, a sales representative employed by Hornblower and Weeks-Hemphill, Noyes ("Hornblower") members of the N.Y. Stock Exchange, met with a group of other registered agents of Hornblower for the purpose of obtaining information regarding the saleability of what was known as a 1969 Hanover drilling fund ("Series 1"). In May of the same year, Mr. Menzel informed Petitioners that Hanover Planning Company, Inc. ("Hanover") was preparing to offer units in the Hanover Planning Company's drilling fund identified as "Series 1". Petitioners made an oral commitment to Mr. Menzel to purchase eight units of Series 1, for the total cost of $5,000.00 per unit. Subsequently, under the terms of the agreement, Petitioners incurred additional development costs of $16,000.00. A little more than a year later, specifically in May 1972, Petitioners were again contacted by Mr. Menzel who informed them that "Hanover" was sponsoring another drilling program, identified as Series 5. Petitioners were induced to make this purchase at the result of Menzel's representations regarding income projections on a Series 3 offering. (February 25, 1971 memorandum) Petitioners purchased a total of four units of Series 5 in 1971 at a price of $20,000.00 ($5,000.00 per unit) and National Standards Association, Inc. also bought a total of four units for

$20,000.00 at this time. In sum, Petitioners invested a total of $106,000.00 in the subject drilling funds.

Petitioners and Robert Menzel were not strangers. They enjoyed a close personal and business relationship for mroe than 20 years. Throughout that period of time, Mr. Bennett maintained an account with "Hornblower", or its predecessor through whom he regularly bought stocks, bonds and similar securities. However, the instant transactions were the first oil and gas drilling funds in which Petitioners participated. Robert Menzel was a direct link between Petitioners, for whom he acted as an investment counselor, for many years, and the Respondents. Respondents were directors of the Hanover Planning Company, Inc., a Delaware corporation and, more than coincidentally, a number of the Respondents were also general limited partners in "Hornblower" which was a partnership until September, 1972, at which time it was incorporated under the laws of the State of Delaware. Mr. Menzel, as noted above, was a registered representative of "Hornblower", who was actively engaged in the selling of securities including but not limited to oil and gas drilling funds in Series 1 and 5 in Hanover. Also, it should be noted that Hanover Planning Company was organized in March 1969 by Hornblower as its wholly owned subsidiary.

Petitioners and similarly situated investors were not the only participants in the drilling funds. The facts show that Respondents were given overriding royalties and, when all was said and done, Respondents realized a gain in excess of $4,000,000.00 on an initial capital investment of $110,000.00, while in the same series of transactions, Petitioners sustained losses of approximately $60,000.00 on a capital investment comparable to that of Respondents. Essentially, the contest between the parties revolved

around the question as to how Respondents, Petitioners' agents, could reap immense profits while, at the same time, Petitioners, as principals, suffered substantial losses in the same drilling funds.

After discovery, the trial court granted Respondents' Motion for Summary Judgment; on appeal the District of Columbia Court of Appeals affirmed. In making its decision on the Motion for Summary Judgment, the trial court relied upon information, allegedly before it, and supposedly contained in the deposition of Clarence Bennett dated May 15, 1974. As a matter of fact, however, Mr. Bennett's deposition had never been filed in the trial court. Respondents moved to have the subject deposition included in the trial record but subsequently withdrew their Motion. Petitioners objected to including any reference to the non-included deposition as part of the record in the District of Columbia Court of Appeals.

REASONS FOR GRANTING WRIT OF CERTIORARI

On August 18, 1977, the District of Columbia Court of Appeals entered judgment in the case of *Clarence H. Bennett, et al. v. Gilbert Kiggins, et al.* in Cases 10089, 10351 and 10546. The appeals involved two essentially different issues. One issue involved the determination of the existence of fraud on the part of the Respondents in the securities transactions in which they acted as agents or co-joint venturers for and with Petitioners. The other issue involved the propriety of including depositions in the record on appeal in the District of Columbia Court of Appeals which were never filed, and consequently could not have been used, in the trial court. Three of the five specific allegations of fraud made by the Petitioners against the Respondents were disposed of in favor of the

Respondents by the trial and appeals courts below and were based upon evidence not of record in either court. Consequently, the Petitioners will integrate their argument(s) on the above issues.

Petitioners claimed in their complaint that the risk which Respondent had represented as to their participating in Series 1 would be minimized because a major portion of the investment would be devoted to geographical areas in which successful drilling were already in place and that only a small portion of the investment would be used for wildcat oil drilling. Similarly, Petitioners claimed throughout that they were persuaded to purchase units in Series 5 on the basis of a Memorandum dated February 25, 1971 involving an analysis of Series 3 – a similar venture – and how important or successful it had been.

As to the first and second claim, the Court of Appeals determined that the Petitioners had conceded the truth of the statements that were made to them regarding the Series 1 transactions (Slip Opinion at page 1257). Regarding the fourth allegation, the Court stated that:

> No proof was presented as the Series 3 projection was a representation as to the performance of Series 5. It is clear from the record that at the time Appellants purchased Series 5 units, Series 5 had no properties and no projection of Series 5 performance could have been made. On deposition, Clarence Bennett admitted that there was no representation by Robert Menzel that Series 5 was as successful as Series 3. They conceded that Menzel did not say anything in this regard.

(Slip Opinion at page 1260). However, there was a factual issue involved as to whether Series 3 was used as a basis

for, or as a model for, projected successfulness of Series 5. Robert Menzel, sales representative, admitted that he utilized information prepared by Hanover reflecting Series 3 income projections as a sales pitch in order to persuade the Petitioners to purchase units in Series 5. Petitioners introduced substantial evidence to the effect that the information thus employed was not based upon geological data and was, in fact, grossly exagerated.

The record is abundantly clear that depositions of Clarence Bennett and Dorothy Bennett were never filed in the trial court. As a matter of fact, Respondents withdrew their original request to include these depositions in the record. The only reference to Petitioners' depositions were those contained in the Respondents' memorandum of Points and Authorities and other pleadings filed with the trial court. There is absolutely no indication that cited portions of the transcripts were accurate and no assurance that they were not taken out of context. The inclusion of the deposition references supplied by Respondents in the record on appeal violated fundamental principles of due process and substantially prejudiced Petitioners. A cursory reading of its opinion reveals that the D.C. Court of Appeals relied heavily upon tangential statements made by Petitioner, Clarence Bennett, in deciding the case as it did.

By including evidence that was not a part of the record before the trial court and by relying upon it as it did, the District of Columbia Court of Appeals departed from the letter and spirit of its own rules to the detriment of Petitioners. (Superior Court Rule 10(1)).

This Court has stated that, "evidence, either written or oral, to be given to the court on the jury, does not become part of the record unless made so by some legal proceed-

ing at the time of trial and before the rendition of judgment." *Baltimore and P.R. Company v. 6th Presbyterian Church,* 91 U.S. 127 (1875). The D.C. Municipal Court of Appeals has held that "depositions which were not offered or received in evidence could not be considered as part of the record." *Butler v. McCalip,* 54 A.2d 644 (D.C. Mun. App. 1947). Similarly, the D.C. Court of Appeals, dealing with rules parallel with the Superior Court's rule dealt with the issue as follows:

> We do not dispute the Government's contention that a supplemental proceeding in the District Court, either before or after an appeal has been noted, is authorized by the Federal Rules where the transcript of record contains "misstatements" or omissions "by error or accident". Such a proceeding would obviously be proper if, for example, the court stenographer had recorded some part of the proceeding below incorrectly or had accidentally omitted something. But it is necessary to keep in mind that correction of the record may be made only with regard to "what occurred in the district court". Nothing in the rules authorizes the trial court to use a supplemental proceeding under Rule 75(h), FRCP 28 USCA, as a means of supplying a record which was never made. There was no omission in the transcript here of anything which actually transpired below; . . . It was for such a limited correction of the record that the rules were intended.
>
> *Butler v. U.S.*, 188 F.2d 24 at 26 (D.C.C.A. 1951)

Other cases support Petitioner's porposition: *Dictograph Products, Inc. v. Sonotone Corporation,* 231 F.2d 867 (2nd Cir. 1956); *Dempsey v. Guaranty Trust Company*

of N.Y., 131 F.2d 103 (7th Cir. 1942); *Washington v. U.S.*, 14 F.R.D. 221 (W.D. Ky. 1953); and *U.S. v. City of Brookhaven*, 134 F.2d 442 (5th Cir. 1943).

The law in the District of Columbia strongly indicates that the record on appeal may not include matters which were not introduced into evidence before the trial court prior to the entry of judgment. Concomitantly, it is also clear that the trial court may not make a ruling based on evidence not before it when deciding a motion for summary judgment.

Nevertheless, the trial court decided the issue on the basis of evidence not of record and the Court of Appeals deemed the deposition to be properly a part of the record on appeal. (Slip Opinion, page 1258). It is a denial of due process of law to retroactively apply a different standard of law or rule of law thereby changing, for the moment at least, the law of the "state."

The insidiousness of the Court of Appeals' ruling below is underscored by the narrowness of its opinion. The main thrust of the Petitioners' case revolved around the fact that a fiduciary relationship existed between them and Respondents, their joint venturers; and, that the sellers, who acted through their agent, had the duty to disclose all relevant facts within their knowledge; and that the presumption of fraud exists when a fiduciary profits greatly at the expense of its principal; and from the overall facts and circumstances of the case.

The Court of Appeals below substantially departed from the prior standards of law as it relates to summary judgment and to the proof of fraud. Well-established principles control the granting of summary judgments. The moving party must prove the absence of a genuine issue as to any material fact; *Adickes v. S. H. Kress & Co.*,

398 U.S. 144, 157, 26 L.Ed. 2d 142 (1970) and his opponent is entitled to all favorable inferences which may be drawn from the evidence presented. *Aderholdt v. Lewis*, 187 A.2d 488 (D.C. App. 1963). If there is the "slightest doubt" as to the facts, summary judgment is improper. *Guestka v. Pell*, 209 A.2d 795 (D.C. App. 1965) and any doubt as to the existence of a material fact will be resolved against the movant. *Poller v. C.B.S., Inc.*, 368 U.S. 464, 7 L.Ed. 2d 458 (1962). The purpose of a summary judgment is not to cut off the litigant from a trial by jury but should be applied only in cases where, without overtechnical views of evidence and fact, it is abundantly clear that no triable issue of fact exists. *Associated Press v. U.S.*, 826 U.S. 1 (1945) and *Sartro v. Arkansas Natural Gas Corp.*, 21 U.S. 620 at 627 (1944). The law does not allow a dismissal of an action unless it appears to be a certainty that the plaintiff is entitled to no relief under any presentable factual situation. *Haines v. Kerner*, 404 U.S. 519, 30 L.Ed. 2d 652 (1972); *Walter Process Equipment v. Food Machine & Chemical Corp.*, 382 U.S. 172 15 L.Ed. 2d 247 (1965) and *Gardner v. Toilet Goods Association*, 387 U.S. 167, 18 L.Ed. 2d 704 (1967). Summary judgment is not usually appropriate where there is an issue as to a state of mind. *Bouchard v. Washington*, 168 U.S. App. D.C. 402, 404, 420, 514 F.2d 824 (1975); *Washington Post Company v. Keogh*, 125 U.S. App. D.C. 32, 34, 365 F.2d 965 (1966) and *Dewey v. Clark*, 86 U.S. App. D.C. 137, 144, 180 F.2d 766 (1950). Considering the appropriate standard for summary judgment, the Court of Appeals for the District of Columbia has previously held that where an evidence of fraud has been presented or reasonable inferences of fraud shown, then summary judgment is not appropriate. *Johnson v. Harris*, 110 Atlantic 2d at 538 (D.C. Mun. App. 1955) and

Tucker v. Beazley, 57 A.2d 191 (D.C. Mun. App. 1948); and *Leed v. Fisco Enterprises, Inc.,* 233 Atlantic 2d 44 (App. D.C. 1967).

More importantly, there is substantial authority for the proposition that when a fiduciary, occupying a confidential relationship, profits at the expense of the person who confides in him, there is a presumption of fraud. *Chung v. Johnsion,* 128 Cal. App. 2d 157, 164, 274 P.2d 922 (1954). *See* also *C.J.S. Fraud,* §95; 37 Am. Jur. 2d *Fraud and Deceit,* §441; 38 A.L.R. 3rd 718, 731.

The nature of the relationship between the parties was that of fiduciary-principal or that of partners or joint venturers. The Petitioners and the Respondents were "venturers" in the same drilling funds; the Respondents' agents sold the "Series" to the Petitioners; and, the Respondents held overriding royalties in the series in which Petitioners participated. In such a case the co-venturer, as principal (Petitioner), could justifiably assume that the Respondents' factual representations *and* opinions regarding reasonable expectations of income in Series 1 and 5 were true. *Riss & Co. v. Feldman,* 79 A.2d 556, 571 (D.C. Mun. Ct. App. 1951); *Risfer v. First National Bank of Stevenson,* 291 Ala. 364, 281 So.2d 261, 267 (1973) and *Ogier v. Pacific Oil and Gas Development Corp.,* 132 Cal. App. 2d 496, 282 P.2d 574, 480 (1955). See also W. Prosser, Torts, §109 at 726 (4th Ed. (1971). (Joint venturers (partners) are fiduciaries.) *Riss & Co. v. Feldman, supra,* D.C. Code §41-320 (1973); and *Homestake Mining Co. v. Mid-Continent Exploration Co.,* 282 F.2d 787, 799 (10th Cir. 1960). Therefore, each partner is under an obligation to make a full and fair disclosure of all material facts known to him and not to the others. *Roby v. Colehour,* 135 L.Ed. 300, 25 at 777

(1890), *aff'd.* 146 U.S. 153, 36 L.Ed. 922 (1892); *Baker v. Cummings,* 4 App. D.C. 230, 262-262 (1894).

In *Baker v. Cummings, supra,* the following quotation is found.

> "Good faith not only requires that every partner should not make any false representations to his partners, but also that he should abstain from all concealments which may be injurious to the partnership business. If, therefore, any partner is guilty of such concealment, and derives a private benefit therefrom, he will be compelled in equity to account therefor to the partnership. Upon the like ground, where one partner, who exclusively superintended the accounts of the concern, had agreed to purchase the share of his copartners in the business for a sum which he knew, from the account in his possession, but which he concealed from them, to be for an inadequate consideration, the bargain was set aside in equity as a constructive fraud, for he could not in fairness deal with the other partners for their share of the profits of the concern without putting them in possession of all the information which he himself had with respect to the state of the account and the value of the concern. Story on Part., Sec. 172.

To the same effect is the conclusion of the learned author who in 3 Lindley on Partnership (chapter 2, book 3, page 569) who, after a review of all the authorities, holds that between copartners, of all men, there should ever be maintained *uberrima fides,* and that 'one who seeks to benefit himself at the expense of his partner must have his conduct tried by the highest standard of honor." Lindley, 771.

Without pausing to refer to the very numerous cases cited by counsel, or to the many others that have come under by observation, I will con'ent myself with quoting from the language of the Supreme of the Supreme Court in 2 Wall. 70: Brooks v. Martin:

'We lay down, then, as applicable to the case before us, and to others of like character, that in order to maintain such a sale (by one partner to another) it must be made to appear, first that the price paid approximates reasonably near to a fair and adequate consideration for the thing purchases; and, second, that all the information in possession of the purchaser, which was necessary to enable the seller to form a sound judgment of the value of what he sold, should have been communicated by the former to the latter." (4 D.C. App. at 261-262)

Moreover, the burden of going forward should be borne by the fiduciary (or the one occupying a confidential relationship with another, i.e., the person in whom a justifiable dependence has been placed) to show that his conduct is free of fraud; such evidence must be quite clear. Cf. *Helms v. Duckworth,* 249 F.2d 489 (D.C. Cir. 1973) and *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corporation,* 193 F.2d 666, 670-71, (D.C. Cir. 1971).

Contrary to the holdings above, the D.C. Court of Appeals stated that "fraud is never presumed unless particularly pleaded. It must be established by clear and convincing evidence which is not equally consistent with either honesty or deceit." (*See* Slip Opinion at 1256).

The Appeals Court thus fragmented the Plaintiffs' case; ignored fundamental principles of law concerning proof of fraud in cases involving fiduciaries; and used evidence which was never of record thereby denying to Petitioners their rights to due process of law and to a trial by jury. *International Terminal Operating Co. v. N.V. Federal A. Merk. Stoomv. MATTS,* 393 U.S. 74 (1968); *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355 (1962) and *Galloway v. United States,* 319 U.S. 372 (1943).

CONCLUSION

Based upon the foregoing, this Court should grant a writ of certiorari.

Respectfully submitted,

ELLSWORTH T. SIMPSON

Bowen Building – Suite 500
815 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 393-2244

Attorney for Petitioners.

APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

Nos. 10089, 10351* & 10546*

CLARENCE H. BENNETT, ET AL., APPELLANTS,

v.

GILBERT KIGGINS, ET AL., APPELLEES.

Appeals from the Superior Court of the District of Columbia

(Hon. Paul F. McArdle, Trial Judge)

(Argued November 17, 1976 Decided August 18, 1977)

Ellsworth T. Simpson for appellants.

Andrew J. Connick, of the bar of the State of New York, *pro hac vice*, by special leave of the court, for appellees. *James A. Hourihan* and *Gail Starling Marshall* were on the brief for appellees.

Before GALLAGHER, NEBEKER and MACK, Associate Judges.

NEBEKER, *Associate Judge*: This is an appeal from a grant of summary judgment on cross-motions for that relief. The unverified complaint alleged that certain fraudulent misrepresentations and omissions attributable to appellees were made to appellants in connection with

---

* *See* note 2, *infra*.

the latters' purchases of undivided interests in joint ventures. These ventures, known as Series 1 and Series 5, were organized for the exploration and production of oil and gas by the Hanover Planning Company, Inc. (Hanover), a wholly owned subsidiary of Hornblower & Weeks-Hemphill, Noyes (Hornblower). We affirm the grant of summary judgment to the appellees.

Hanover was organized in March, 1969, by Hornblower to arrange and manage, as agent, a number of joint ventures through which customers of Hornblower could participate in the exploration for oil and gas. Appellees were, at all relevant times, either general partners of Hornblower or officers of Hanover. Appellants Clarence and Dorothy Bennett are husband and wife, and appellant National Standards Association, Inc. is a corporation wholly owned by the Bennetts.

The complaint alleged five basic misrepresentations and one omission which were claimed to constitute fraud. Three of the misrepresentations related to the offer of units in Series 1: (1) The risk in such ventures would be minimized because a major portion of the investment would be devoted to those areas in which there were successful oil drilling operations. (2) Only a small portion of the investment would be used for wildcat drilling. (3) Within two or three years following the purchase of the units in Series 1, the investor would be provided with the opportunity for liquidity by means of an exchange offer of the units for shares in an established and well-known oil company, such as Mesa Petroleum.

Two misrepresentations and an omission were claimed as to the sale of units in Series 5: (4) A memorandum directed to all participants in Series 3, a similar venture, had attached to it a schedule showing income projections from existing Series 3 properties. This memorandum al-

legedly was used as a factual basis for the projected performance of Series 5 and as an inducement for appellants' purchase of units in Series 5. Moreover, the projections for Series 3 allegedly were false and were known or should have been known by appellees to be false at the time the projections were made. (5) In negotiating the sale of units in Series 5, the sales representative stated that appellants' initial investments would be returned to them before Hornblower received anything.[1] (6) No disclosure was made during the sale of Series 5 to appellants of the fact that the partners of Hornblower had already planned or were contemporaneously planning to alter the capital structure of Hanover and then to offer to exchange stock in Hanover for units in the various Series as a means of providing the liquidity to the investors mentioned in (3) above. This belatedly disclosed plan allegedly resulted in appellees profiting inordinately at the expense of investors in the various Series.

The first two alleged misrepresentations were contained in the prospectus for Series 1. The third, according to appellants, was made by Robert Menzel, a registered representative employed by Hornblower, when he was persuading appellants to buy units in Series 1. As to the fourth, the memorandum on Series 3 was prepared by Hornblower to describe recommended development work on property interests owned by the Series 3 drilling program. The memorandum was generally available in the Hornblower offices at the time appellants were there de-

[1] Because appellants' complaint makes this allegation with respect to the sale of units in Series 5, we treat it as such. We note, however, that appellants' briefs treat the representation as having been made with respect to the sale of Series 1. The deposition of Robert Menzel, Hornblower's sales representative, also suggests, although ambiguously, that it was made with respect to Series 1.

ciding whether to invest in Series 5. The fifth allegation, regarding Hornblower's compensation, was a representation claimed to have been made in connection with Menzel's sale of Series 5 units to appellants. Finally the claimed omission during the sales pitch for Series 5 units was a conclusion by appellants based on the overall advantageous effect to appellees of the concluded exchange offer.

After extensive pretrial discovery and oral argument on the cross-motions for summary judgment, the trial court concluded that there were no genuine issues as to any material facts and accordingly granted summary judgment to appellees. This court's function on the appeal of a grant of summary judgment is to determine whether any material factual issue exists. Super. Ct. Civ. R. 56(c); *Dewey v. Clark*, 86 U.S.App.D.C. 137, 143, 180 F.2d 766, 772 (1950). Viewing the record in the light most favorable to the opposing party, *Adickes v. Kress & Co.*, 398 U.S. 144, 157 (1970), we are satisfied that there are no disputed material factual issues bearing on the existence of the alleged fraud. Accordingly, summary judgment was properly granted appellees. *See International Underwriters, Inc. v. Boyle*, D.C.App., 365 A.2d 779 (1976).

The parties failed to include in the record on appeal their respective statements of material fact as to which there is no genuine issue. Such statements were required to be filed in the trial court in conjunction with the motions for summary judgment. *See* Super. Ct. Civ. R. 12(k). For purposes of our review, those statements were a necessary part of the record on appeal. We ordered them included as a supplemental record. *See* D.C.App.R. 10(*l*). Our examination of the record has been made in light of these statements. We may not consider unsupported contentions of factual dispute contained elsewhere in a memorandum filed in opposition to summary judgment. *See Dillard v. Travelers Insurance Co.*, D.C. App., 298 A.2d 222, 224 (1972); *Kron v. Young & Simon, Inc.*, D.C.App., 265 A.2d 293, 295 (1970). A material factual dispute must be pleaded as required by Super. Ct. Civ. R. 12(k) and 56(e).

Fraud is never presumed and must be particularly pleaded. It must be established by clear and convincing evidence, which is not equally consistent with either honesty or deceit. *See* Super. Ct. Civ. R. 9(b). *Zoslow v. National Savings & Trust Co.*, 91 U.S.App.D.C. 391, 201 F.2d 208 (1952); *Wynne v. Boone*, 88 U.S.App.D.C. 363, 191 F.2d 220 (1951). The essential elements of common law fraud are: (1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation. *United States v. Keifer*, 97 U.S.App.D.C. 101, 228 F.2d 448 (1955), *cert. denied*, 350 U.S. 933, *rehearing denied*, 350 U.S. 977 (1956); *Rosenberg v. Howle*, D.C.Mun.App., 56 A.2d 709 (1948); *Sankin v. 5410 Connecticut Avenue Corp.*, 281 F. Supp. 524 (1968), *aff'd sub nom. Benn v. Sankin*, 133 U.S.App.D.C. 361, 410 F.2d 1060 (1969), *cert. denied*, 396 U.S. 1041 (1970). Nondisclosure or silence, as well as active misrepresentation, may constitute fraud. *See St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 412 F. Supp. 45 (E.D. Mo. 1976). One pleading fraud must allege such facts as will reveal the existence of all the requisite elements of fraud. Facts which will enable the court to draw an inference of fraud must be alleged, and allegations in the form of conclusions on the part of the pleader as to the existence of fraud are insufficient. Applying these standards to the record, we cannot say that the conclusion of the trial court finding no genuine issue as to material facts bearing on fraud was error.

On the undisputed facts, no representations or omissions in connection with appellants' purchases of units in the Hanover drilling funds were fraudulent. Fraud could only be discerned, if at all, by means of impermissible speculation. On deposition, Clarence Bennett admitted that the first two representations claimed to be fraudulent were not false.[2] Moreover, any lack of finan-

[2] The concession as to the truth of the statement that most of the drilling for Series 1 was to be done in areas which were currently successful was as follows:

By Mr. Connick:

Q. "Is it your contention that the major portion of the investment in Series 1 was not devoted to those areas in which there were currently successful oil drilling operations?"

A. "I am not contesting that at all. What I am contesting is the fact that we were not getting back what was represented to us that we would get back."

* * * *

Q. "I will get to that. I am just interested in this one sentence. You don't claim that it is false?"

A. "No, I don't claim it's false." [Memorandum of Points and Authorities in Support of Defendants' Motion for Summary Judgment.]

The concession as to the truth of the statement that little wildcatting would be done in Series 1 was as follows:

By Mr. Connick:

Q. "Going on on page 5 [of the complaint] and I quote: 'Mr. Menzel further explained to Plaintiffs that only a small portion of such investment [in units of Series 1] would be utilized for speculative or "wild-cat" drillings.' "

A. "That's essentially what is put in the prospectus."

Q. "You don't maintain at this point that that was a false statement?"

A. "No." [*Id.*]

Appellants, attempting to escape the consequences of these concessions made by Clarence Bennett, sought to have stricken

cial success of Series 1 was warned against in the Series 1 prospectus which noted:

> The business of exploring for and producing oil and gas is highly speculative and involves risk of loss. . . . Therefore, there can be no assurance that the Program will be a success financially or that moneys invested by the participants will be recouped. In view of the foregoing, and the impact of Federal tax laws, the offering of the Units is directed primarily to persons whose income is subject to Federal income taxes at high rates. . . .

In light of appellants' admissions and the disclosed speculative nature of oil ventures in general, there is no genuine issue as to the first two allegations.

As to the third alleged misrepresentation, Hornblower's sales representative, Robert Menzel, stated on deposition that it was his estimate, and it was an estimate given to him, that within approximately three to five years an attempt would be made to convert the units to a going operation which would make the interests negotiable. No trial is necessary to determine whether this representation promised mere liquidity or whether it promised liquidity via stock in an established oil company—the lat-

from the record on appeal all references to the appellants' depositions. These references are contained in appellees' memorandum of points and authorities and other pleadings filed in the trial court. However, this court on March 12, 1976, ordered that these references not be stricken from the record on appeal. We see no reason to question the correctness of that order. There appeared to have been a failure to file the depositions. The accuracy of them is not challenged. Appeals No. 10351 and No. 10546 are consolidated with the main appeal, No. 10089, and involve a challenge to the use of this plaintiff's deposition. We deem the deposition properly to be a part of the record on appeal.

ter apparently foreclosing by implication Hanover stock as the vehicle for liquidity.

A promisory representation, or a representation as to future events asserted in a common law fraud action, should only be considered a misrepresentation of fact where the evidence shows that the promise was made without the intent to perform, or that the promisor had knowledge that the events would not occur. *See United States v. Grayson*, 166 F.2d 863 (2d Cir. 1948). *See also Day v. Sidley & Austin*, 394 F. Supp. 986 (D.D.C. 1975). When a person positively states that something is to be done or is to occur, when he knows the contrary to be true, the statement will support an action in fraud. On the other hand, a prophecy or prediction of something which it is merely hoped or expected will occur in the future is not actionable upon its nonoccurrence. *Channel Master Corp. v. Aluminium Limited Sales, Inc.*, 4 N.Y.2d 403, 151 N.E.2d 833 (1958); *People's Furniture & Appliance Co. v. Healy*, 365 Mich. 522, 113 N.W. 2d 802 (1962).

Nothing in the record establishes or suggests that the third representation was made without the intention to perform or with the intention to mislead or deceive. *See Forland v. Orange Groves of Florida, Inc.*, 377 F.Supp. 690, 706 (M.D. Fla. 1974). Appellants averred no admissible evidence to put this issue in disputed factual context. A mere allegation in an unverified complaint is not enough. *See Dillard v. Travelers Insurance Co.*, *supra*; Super. Ct. Civ. R. 56(e).

Moreover, the representation is nothing but a prediction of a hoped-for or expected future occurrence rather than a positive representation of a specific arrangement. Also, according to the undisputed facts, an attempt was made to arrange an exchange offer with General Exploration Company of California. However, the terms were

deemed unattractive by Hanover. Subsequently, liquidity was made available to appellants by means of the exchange offer of Hanover stock—an offer appellants refused.

As to the fourth allegation, no proof was presented that the Series 3 projection was a representation as to the performance of Series 5. It is clear from the record that at the time appellants purchased Series 5 units, Series 5 had no properties and no projection of Series 5 performance could have been made. On deposition, Clarence Bennett admitted that there was no representation by Robert Menzel that Series 5 would be as successful as Series 3 and he conceded that Menzel could not say anything in this regard. Under the circumstances, the Series 3 projection cannot be viewed as creating a factual issue respecting fraudulent inducement to purchase Series 5 stock. We think this is the case even with the additional factor that actual production in Series 3 turned out to be far less than the projected amounts.

The alleged misrepresentation as to the return of the initial investment (the fifth assertion) was not claimed to have been relied upon by appellants. *See Price v. Griffin*, D.C.App., 359 A.2d 582 (1976). Moreover, the statement was in addition to and in contradiction of the terms of the prospectus which explicitly stated:

> Hornblower will receive from the Company as a commission for its services as agent in the offering of Units in the Fund (i) a cash commission in an amount equal to 3½% of the aggregate Investment Moneys paid to the Company in respect to all Units sold by Hornblower and (ii) a part of the Company's Overriding Royalty . . . . [Series 5 Prospectus, at 2 and 18.]

The evidentiary weight of this statement is supplemented by the disclaimer in the prospectus as to representations

other than those contained in the prospectus itself. Upon these facts, there is no issue as to whether appellants, as experienced investors, were fully apprised of compensation accruing to Hornblower.

Finally, appellants fail to set forth facts which create an issue as to when Hanover decided to offer its own shares to participants in its drilling funds. Since no evidence in the record indicates plans for an exchange offer involving Hanover stock until after plaintiffs bought units in Series 5, it could not be concluded that an omission amounting to fraud resulted with respect to the sale of Series 5 which can be deemed fraudulent. A statement by William West, onetime president of Hanover, respecting whether the specific Hanover exchange was contemplated as early as 1969, is ambiguous at best. His affidavit denying such early contemplation of an exchange of Hanover stock more than offsets the ambiguity raised by his earlier comment. Without more, no triable issue of fact was presented.

The absence of material issues as to the existence of representations or omissions which would amount to fraud makes it unnecessary for us to consider whether to attribute the representations and omissions to appellees. We also note that although appellants' complaint did not include a claim of breach of fiduciary duty, appellants make such a claim on appeal. However, even if we assume the existence of a fiduciary relationship between the parties, no specific facts—aside from bare allegations—have been set forth by appellants which show a genuine issue as to whether a fiduciary duty has been breached. As discussed above, the facts presented indicate no misstatements or omissions concerning the subject matter of the sale of units and the exchange offer.

Accordingly, the grant of summary judgment to appellees is

Affirmed.

[1261]

IN THE SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA

CIVIL DIVISION

CLARENCE H. BENNETT, *et al.*, *Plaintiffs,*	:	
v.	:	Civil Action No. CA 7314-74
GILBERT KIGGINS, *et al.*, *Defendants.*	:	Paul F. McArdle, Judge Civil 1

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER OF THE COURT

FINDINGS OF FACT

1. Each of the defendants either presently is or has been a director of Hanover Planning Company, Inc. ("Hanover"), a Delaware corporation. Hanover was organized in March, 1969 by Hornblower & Weeks-Hemphill, Noyes ("Hornblower"). Since its inception Hanover has engaged in the organization and management, as agent, of a number of "drilling programs" or joint ventures through which customers of Hornblower have parcipated in exploration for oil and gas. Hornblower is a registered broker-dealer and is engaged in the business of buying and selling securities for the accounts of its customers and other related activities. Hornblower was a partnership until September 1972 at which time it was incorporated under the laws of Delaware. At all relevant times prior to September, 1972, defendants Noyes, Clark, Sharer, Maloney and Buhse were general partners of Hornblower. Defendant Kiggins was a general partner

until October 1970, and defendant Klein became a general partner in November, 1969. Defendant West was never a general partner of Hornblower.

2. Plaintiff's Clarence Bennett and Dorothy Bennett are husband and wive, and plaintiff National Standards Association, Inc. is a corporation wholly owned by the Bennetts. In May 1969, the Bennetts purchased four units in the 1969 Hanover Drilling Fund Series 1 ("Series 1") at an aggregate price of $20,000. National Standards Association also purchased four units in Series 1 at an aggregate price of $20,000 in May 1969. In May 1971, the Bennetts purchased four units in the 1971 Hanover Drilling Fund Series 5 ("Series 5") at an aggregate price of $20,000. National Standards Association, Inc. also bought four units at an aggregate price of $20,000 in May 1971. Each of these purchases was made by plaintiffs after discussions with Robert Menzel, a registered representative employed by Hornblower in its District of Columbia office. Plaintiffs received a copy of the prospectus for Series 1 dated May 14, 1969 before their purchases of Series 1 and a copy of the prospectus for Series 5, dated January 22, 1971, before their purchases of Series 5.

3. Prior to plaintiffs' purchase of the Series 5 units, plaintiff C. Bennett read a memorandum entitled "Notice to all Participants in the 1970 Hanover Annual Drilling Fund, Series 3", dated February 25, 1971. That memorandum was not delivered to plaintiffs by Hornblower or by Menzel; plaintiff C. Bennett picked it up on his own in Hornblower's office in the District of Columbia while it was being reproduced and when Mr. Menzel was not present. Plaintiff C. Bennett was aware that the income figures therein were projections and that the projections in no way related to Series 5, which at that time held no

properties and thus could have no projected income. The memorandum was prepared by Hanover solely in order to describe further development work recommended with respect to property interests acquired for the Series 3 drilling program, to project income from these properties and to aid Series 3 participants in deciding whether to finance their proportionate share of the cost of development work. Copies of the memorandum were sent to owners of Series 3 and to the Hornblower sales personnel so that they could discuss with customers who owned Series 3 whether to finance development costs. The income projections in the February 1971 memorandum were prepared in good faith by Hanover by reference to (a) oil and gas reserves estimated on the basis of the best geological and engineering information available at the time and (b) relevant economic data, such as prevailing oil and gas prices.

4. In the spring of 1971, Hanover learned of the strong desire to participants in Series 1 and 2 to exchange their units for a more liquid security. At that time, consideration was given solely to the possibility of exchanging units in Series 1 and 2 for securities of an independent oil company. Initial discussions on the question of a possible conversion of units in Series 1 and 2 were had with General Exploration Company of California but the General Exploration proposal was deemed economically undersirable and eventually rejected by Hanover in early July, 1971. In early fall, 1971, the possibility of offering an exchange of units for Hanover stock was first considered by Hanover. After consultation with legal counsel and accountants, it was determined, in November, 1971, to proceed with such an exchange offer. The exchange offer, as finally proposed in a prospectus dated June 7, 1972, was studied by two independent investment bankers and determined to be fair.

5. In June 1972, Hanover offered to exchange 1,828,-449 shares of its common stock to participants in Series 1 through Series 6 for the property interests represented by such units and to exchange additional shares for interests of others in certain oil and gas properties. The exchange offer enabled participants in Series 1 through Series 6 to obtain a security which was more readily marketable and transferable than the fractional oil and gas interests in the properties subject to the exchange. Plaintiffs received a copy of this exchange offer prospectus, elected not to accept the exchange offer and thus continue to hold units in Series 1 and Series 5.

6. Except for defendant Kiggins no defendant gave Robert Menzel any instructions with respect to selling Series 1 or Series 5. In early 1969, defendant Kiggins spoke to a group of Hornblower salesmen, including Robert Menzel, in regard to Series 1, but did not instruct said salesmen in regard to the subject matter of any of the misrepresentations allegedly made by Menzel to plaintiffs.

CONCLUSIONS OF LAW

1. In connection with plaintiffs' purchase of Series 1 and Series 5, Robert Menzel did not a) make any representations of material fact which were false and known by him to be false, or b) intentionally fail to disclose any material fact.

2. Defendants have no liability for any allegedly fradulent misrepresentation or omission on the part of Robert Menzel in connection with plaintiff's purchase of Series 1 and 5.

3. There is no genuine issue as to any material fact, and defendants are entitled to summary judgment dismissing the complaint as a matter of law.

ORDER

This action having come on for hearing before this court on the defendants' motion for summary judgment and a cross-motion for summary judgment by the plaintiffs and supporting and opposing documents submitted in connection therewith as well as oral argument by counsel, this court having found that there is no genuine dispute as to any material issue of fact, and which a further finding that plaintiffs are entitled to judgment as a matter of law, in accordance with the above findings of fact and conclusion of law.

IT IS HEREBY ORDERED that plaintiffs' motion for summary judgment be and hereby is denied; and it is

FURTHER ORDERED that defendants motion for summary judgment be and hereby is granted; and it is

FURTHER ORDERED that judgments be entered in favor of defendants and against plaintiffs and that all costs be assessed against plaintiffs.

/s/ Paul F. McArdle,

Paul F. McArdle, Judge

Dated
August 18, 1975

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

No. 77/706

CLARENCE H. BENNETT, *et al.*,

Petitioners,

v.

GILBERT KIGGINS, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

ANDREW J. CONNICK
1 Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-2660

Attorney for Respondents.

Of Counsel:
MILBANK, TWEED, HADLEY
& MCCLOY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

QUESTIONS PRESENTED

1. Should a petition for certiorari be granted when petitioners failed to raise any Federal issue in the courts below?
2. Should a petition for certiorari be granted merely to review the trial court record to determine if that court's findings were proper?

REASONS FOR DENYING THE PETITION

I

PETITIONERS FAILED TO RAISE SPECIFICALLY ANY CONSTITUTIONAL ISSUE IN THE COURTS BELOW

It is fundamental to the jurisdiction of this Court that it appear that a Federal issue was specifically presented to the courts below and that those courts actually decided such an issue. *Cardinale* v. *Louisiana,* 394 U.S. 437 (1969); *Lynch v. New York ex rel. Pierson,* 293 U.S. 52 (1934); *Oxley Stave Company v. Butler County,* 166 U.S. 648 (1896). As no such issue was presented or decided, the petition must fail.

In *Oxley,* the Court long ago set forth the applicable principles as follows:

> This court may reexamine the final judgment of the highest court of a State when the validity of a treaty or statute of or an authority exercised under the United States is "drawn in question" and the decision is against its validity, or when the validity of a statute of or an authority exercised under any State is "drawn in question" on the ground of repugnancy to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even if it denied some title, right, privilege or immunity of the

unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party, under the Constitution or some treaty, statute, commission or authority of the United States. Rev. Stat. § 709.

Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States. Nor can it be inferred from the opinion of the Supreme Court of Missouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question. 166 U.S. at 653.

Nowhere in the Findings of Fact, the Conclusions of Law or the Order of the Superior Court or in the opinion of the Court of Appeals (Petition for Certiorari at 1a-11a) is there any mention of any constitutional issue raised, specifically or generally, by petitioners herein. By reason of the foregoing, the petition must be denied.

II

PETITIONERS IMPROPERLY SEEK REVIEW OF A DECISION WHICH DID NOT INVOLVE A FEDERAL QUESTION

Petitioners brought an action charging respondents with common law fraud. After extensive pre-trial discovery, both sides moved for summary judgment, each asserting that there were no material issues of fact and that it was entitled to summary judgment as a matter of law. After oral argument, the trial court issued findings of fact and conclusions of law and awarded judgment to respondents on the basis of the record

before it.* Thereafter petitioners unsuccesfully appealed. In light of this history, it is clear that by their petition, petitioners are not presenting any genuine Federal questions for possible review but are merely requesting the Court to act as a general appellate court and to review findings of fact made in the trial court below. The Court has no jurisdiction to grant such a request. *Waters-Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86 (1909); *Remington Paper Company v. Watson*, 173 U.S. 443 (1899).

In *Remington*, the Court stated:

> The action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve Federal questions, and therefore it is not within our power to review the judgment of the Supreme Court of the State.
>
> The plaintiff in error thus sought in the state court, and was given opportunity, to litigate the rights claimed by it, and it cannot complain that the guarantees of the Constitution of the United States were denied because the litigation did not result successfully. 173 U.S. at 451.

Similarly in *Waters-Pierce*, it was concluded:

> The jurisdiction of this court to review the proceedings of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal

---

* Petitioners' contention that it was improper for the Superior Court to consider portions of their depositions is without merit. Those excerpts, which were contained in respondents' points and authorities on the summary judgment motions and merely set forth disclaimers of misrepresentations alleged in the complaint, were properly before the lower courts. Super. Ct. Civ. R. 12-I(e). Moreover, there was never any suggestion that they were inaccurate or incomplete.

> rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court. 212 U.S. at 97.

However, even if it were appropriate for the Court to consider such matters as to which petitioners seek review, the petition would fail for it is clear that summary judgment was properly granted. Such conclusion is established not only by the decisions of the lower courts but also by the fact that petitioners even at this late date cannot point out a single issue of material fact with respect to their charges of fraud which the lower courts overlooked.

In view of the fact that petitioners are clearly asking this Court to review the record in the courts below and the trial court's findings of fact based thereon, the petition must be denied as it does not involve a substantial Federal right.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

ANDREW J. CONNICK
1 Chase Manhattan Plaza
New York, N. Y. 10005
(212) 422-2660
Attorney for Respondents